**UNITED STAES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**ANDRONACO, INC., d/b/a ANDRONACO INDUSTRIES,**

Respondent **Case 07-CA-160286**

and

**LINDSEY JOHNSTON,** an Individual,

Charging Party
_____/

**RESPONDENT ANDRONACO INDUSTRIES' BRIEF IN SUPPORT OF EXCEPTIONS**

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## I. INTRODUCTION

The Complaint in this case alleged three categories of violation. The first is that the Charging Party, Lindsey Johnston, was discharged for engaging in "concerted activities ... by discussing the wages, hours, and working conditions of Respondent's employees." In fact, there was no evidence presented at the trial to even remotely suggest that Ms. Johnston engaged in any such activity. What the evidence does show is that Ms. Johnston was discharged because of performance issues over a lengthy period of time.

The second category is alleged coercive interrogation by supervisors Richard Vining, and an accusation of disloyalty by Kaila Hicks.[1] These allegations were never the subject of any unfair labor practice charge. The Administrative Law Judge held that there was no coercive interrogation but that the alleged disloyalty comment violated § 8(a)(i). (ALJ D., p. 16)

Finally, the last category was that certain provisions of the Company's handbook are alleged to interfere and restrain employees in the exercise of their Section 7 rights. In fact, the provisions at issue were never intended to and do not impact on Section 7 of rights. Respondent is willing to add clarifying language, and thus, does not except to any of the findings with regard to the handbook.

## II. STATEMENT OF FACTS

### A. Discharge of Lindsey Johnston

#### 1. The Nathaniel Barrett Connection

One of the things made clear at the trial was that Ms. Johnston never discussed anyone's wages with anyone else, never engaged in any Section 7 activity, and that no member of management thought she did. Thus, the ALJ found her discharge to be unlawful under a new

[1] The Complaint identifies her as Kaila Schweda. She has since married and her name is now Kaila Hicks.

theory, not alleged in the complaint: That she was discharged because of her association with a former employee, Nathaniel Barrett.

Mr. Barrett had worked for the Company in the IT Department doing graphic design. (Tr. 28.) On May 15, 2015, Mr. Barrett submitted his written resignation, which stated his intention that his employment would end two weeks later on May 29, 2015. (Tr. 32, GC-3)

On May 28, 2015, the day before his intended last day, Mr. Barrett had a conversation with Scott Cascaden, an Andronaco production employee (Tr. 33). That conversation was, in part, about wages. Here is Mr. Barrett's description of that conversation:

> A. We just talked about how much we had heard some people made and how -- he told me how much he made and how he was hoping to make more and all that stuff, you know.

(Tr. 33.)

Mr. Barrett characterized this as "water cooler talk." (*Id.*) After this conversation, Mr. Cascaden sought out Mr. Andronaco, the Company's CEO, and reported to him that Mr. Barrett had been discussing wage information of Mr. Andronaco, Ms. Hicks, and Mr. Cascaden himself. (Tr. 179.)

Mr. Andronaco then called Mr. Barrett to his office. Mr. Andronaco and Mr. Barrett both agree that Mr. Andronaco's concern was not that anyone's wage information may have been shared, but rather that secured portions of the Company's computer system, which contained highly confidential information, may have been improperly accessed. As Mr. Andronaco testified, if Mr. Barrett was truly knowledgeable about employee wage information, the most likely way that he would have obtained that information was that if he or someone else had improperly accessed it on the Company's computer system. (Tr. 179-80.) To gain such access a person would have to know the administrative password, and anyone who had the administrative

password would have access to all the information stored on the Company's system, including highly confidential information:

> Q. All right. So if, in fact, Mr. Barrett, as you were concerned about at that point, had the administrative password, what kind of information would that give him access to?
>
> A. He could get into Social Security numbers. He could get into bank information. He could get into my computer which has acquisition information on it, companies that we're looking to acquire. He could get into health information, you know, and I was concerned for all our employees, including Lindsey's, that what information he had.

(Tr. 180-81.)

Mr. Barrett confirmed that Mr. Andronaco's concern was that someone had improperly accessed the computer system.

> Q. And what he was talking about is if he thought you had accessed part of the system that you weren't supposed to access, he would take legal action against you, right?
>
> A. Um-hmm, yeah, yeah.
>
> Q. So the reason he was going to take action against Mr. Kyle -- at least what he was telling you was because he got into a part of our computer system that he didn't have a right to get into.
>
> A. Yeah.

(Tr. 51.)

This is critical testimony which the ALJ completely ignores. One of the cornerstones of her decision is that Ron Andronaco was concerned about Mr. Barrett's discussion of wages, and not the possibility that he had gained improper access to the computer system. (ALJ D., pp. 9, 10, 14) Yet, in reaching that conclusion, she did not even consider this testimony from Mr.

Barrett himself, one of the General Counsel's main witnesses, which confirms that Mr. Andronaco voiced concern about access, not wages.

For the next several weeks the Company asked for Mr. Barrett's cooperation in determining the extent of the security breach. (Tr. 182.) Mr. Barrett declined to cooperate. (Tr. 38). In light of Mr. Barrett's lack of cooperation, and to protect its interest in its confidential information, the Company filed a lawsuit against Mr. Barrett in the Kent County Circuit Court. That complaint was filed on August 7, 2015. (Tr. 183, GC-7.) What is critical to this case was that in connection to the settlement of that case Mr. Barrett gave an affidavit in which he affirmed that the only confidential information he had been privy to was certain unverified wage information, and that the only people he had discussed that information with were a former employee by the name of Kyle Eadie, Mr. Cascaden, the National Labor Relations Board, and Mr. Barrett's lawyer. (Tr. 58, GC-9.) At the trial, Mr. Barrett confirmed that the affidavit was accurate in this and every other respect, and that he would not have signed it if it was not. (Tr. 63.) Thus, Mr. Barrett confirms that he did not have any discussions about wages with Ms. Johnston.

There is not one piece of evidence to suggest that Mr. Barrett engaged in any conversation with Ms. Johnston about wages or any other confidential information. Mr. Barrett's testimony on this point is that he did not engage in any such conversation with Ms. Johnston and that testimony is undisputed.

Not surprisingly, then, there is no evidence to suggest that anyone in management thought that Ms. Johnston was involved in this episode at all.

**2. Robert Zurita**

Mr. Zurita was a press operator. (Tr. 65.) According to the General Counsel, his testimony was offered to show "a coordinated effort to go after individuals who were associated with Mr. Barrett." (Tr. 69.) But what is clear from his testimony is that no one ever went after Mr. Zurita. He quit his job.

Mr. Zurita learned about the Company's lawsuit against Mr. Barrett, and was upset with that information. He raised the issue with his supervisor, Tony Hinerman. (Tr. 67.) He told Mr. Hinerman that he did not think he could work for a Company that was suing his friend. (Tr. 172.) Mr. Hinerman did not know what was going on with Mr. Barrett, and so brought Mr. Zurita's concerns to the attention of Mr. Andronaco. (*Id.*) Mr. Andronaco and Mr. Hinerman went back to Mr. Zurita's work area to talk to him about the situation and try to convince him to continue working for Andronaco. (Tr. 172-73.) Mr. Zurita said two times during this conversation that he could not work for a Company that was suing his friend. (Tr. 73.) The next day he went to Human Resources, filled out the paperwork for leaving employment and never showed up to work again. (Tr. 70.) Initially, in his testimony, there was some suggestion that when Mr. Zurita went to the Human Resources Department, he only intended to give a two-weeks' notice, but somehow was forced to quit on the spot. However, Mr. Zurita cleared up the confusion about that himself. Here is what he said:

> A. I basically came in there, and I sat down, and then she gave me a paper that said what I need to know when I leave the Company, and they basically told me -- like I said, this is the way I felt. I just didn't want to drag it out, and just go ahead and terminate me that day.

(Tr. 70.)

Thus, according to Mr. Zurita, he did intend to give his two weeks' notice, but as he sat in the Human Resources office, he decided to end it then.

Mr. Hinerman understood that Mr. Zurita had quit his job. (Tr. 174.) Mr. Andronaco understood that Mr. Zurita had quit his job. (Tr. 184.) In fact, Mr. Zurita agrees that based on what he had said it was perfectly reasonable for Mr. Andronaco and other members of management to conclude that he was quitting his job.

Q. BY MR. RYAN: "I said fine, that I was planning to submit my 2 weeks' notice anyway the next day." That's what you wrote on this affidavit?

A. Yes.

Q. So were you or weren't you planning on submitting your 2-week notice?

A. I was, but at the conversation I had with Ron Andronaco, I was not. I hadn't made up my mind then.

Q. You had made up your mind shortly after the conversation with Mr. Andronaco that you were going to submit your 2 weeks' notice.

A. It was following, the next day, yes.

Q. And the reason is because Andronaco was suing your friend.

A. Yes.

Q. And you told Mr. Andronaco twice during that conversation, I don't think I can work here if you're suing my friend.

A. Yeah.

Q. Do you see how maybe Mr. Andronaco or the Company might have gotten the impression that you were going to quit?

A. Yeah, I can see that.

Q. And, in fact, if that's the impression they got, they would have been right, because you were going to quit, right?

A. Yes.

(Tr. 73-4.)

Even though the testimony, even from Mr. Zurita was undisputed that he quit his job, the ALJ declined to find one way or the other on that issue. She did, however, find that "Respondent's discussions with Mr. Zuirita show Respondent was intensely concerned whether Barrett release information about pay …". (ALJ D., p. 10, Tr. 10) There is not one word of testimony from any witness to support this. Mr. Zurita's testimony was found at pages 65 to 74 of the transcript and he does not even remotely suggest that there was any discussion about Mr. Barrett's disclosure of wages.

**3. Lindsey Johnston**

The Complaint alleges at paragraph 6 that the Company discharge Lindsey Johnston because:

> "About the months of May, June and July 2015 [she] engaged in concerted activity with other employees for the purpose of mutual aid and protection by discussing the wages, hours and working conditions of Respondent's employees."

There is no evidence in the record that Ms. Johnston engaged in any concerted activity, that she discussed wages, hours or working conditions with any other employees, or that anyone in management thought she did. There is a wealth of evidence in the record which shows that a pattern of performance issues over the lengthy period of time was the reason Ms. Hicks made the decision to terminate Ms. Johnston's employment.

Ms. Johnston was employed by the Company as its receptionist. (Tr. 89.) She was stationed at the entryway to the Company's office. (*Id.*) Her job included greeting visitors, doing data entry, typing, and ordering office supplies. (Tr. 89-90.) She had a computer at her desk. (Tr. 90.) Her supervisor was Kaila Hicks. (*Id.*) Ms. Hicks had significant concerns about Ms. Johnston's performance. In fact, even the ALJ conceded that Ms. Hicks wanted to terminate

Ms. Johnston "all year" based on these performance issues. (ALJ D., p. 14) Ms. Hicks began documenting those performance issues many months before the discharge. (Tr. 150.) A major concern was Ms. Johnston's poor attendance. (Tr. 137.) The first documented evidence of this in the record is Respondent's Exhibit 1 which is an e-mail dated July 8, 2014 placed in Ms. Johnston's file. The e-mail evidenced a meeting Ms. Hicks' and the Company's CFO, Scott Palmitier, had with Ms. Johnston to address her attendance problems. It followed an absence over the 4th of July in 2014. The purpose of the meeting was to reiterate to Ms. Johnston how important her attendance was and to ask her to "make it a priority." The e-mail states that the meeting was not to tell Lindsey that "it is her last straw." In fact, it was not the last straw. There were several more straws to come before the last one.

Ms. Johnston's poor attendance was also addressed in the performance review she received in February 2015. (Tr. 97, R-5.) On this review, she was given "poor" marks in reliability and willingness to take on additional responsibilities. She acknowledges the reliability issue was directly attributable to her poor attendance, and that her attendance was, in fact, poor. (Tr. 97.)

Attendance was always a problem for Ms. Johnston. The Company has a point-based attendance program. (Tr. 135-37.) For every month of perfect attendance, an employee gets two positive points, and when an employee has an absence not covered by vacation, paid personal time, or approved leave, they get a negative point. (*Id.*) Ms. Johnston admitted that she had poor attendance and that she was always, or almost always in a negative situation. (Tr. 97.)

By the beginning of 2015, Ms. Hicks was so concerned about Ms. Johnston's performance issues that she started to keep a running log of those problems. (Tr. 139.) That log was admitted as Respondent's Exhibit 6.

The first entry on the log is dated January 6, and documents that Ms. Johnston failed to punch out for the day as she was required to do. (Tr. 140.) Like attendance, this was a recurring theme during Ms. Johnston's time with the Company. This is evidenced by the formal written warning she was given on January 7, 2015 (R-2).

The second entry on Ms. Hicks' log is dated April 13. On that date, Ms. Johnston was running late for work. (Tr. 101.) Thus, punching in late would, of course, mean another negative point under the attendance policy. (*Id.*) So to avoid the negative point, Ms. Johnston pulled up to the entry to the building, entered and punched her time card, and went back out to her car, drove her car to the parking area, parked it and then entered the building and went to work. (*Id.*) Collin Cruttenden, the plant manager, observed this and reported it to Ms. Hicks. (Tr. 141.) Even Ms. Johnston acknowledges that she should most have done this and that it was "bad judgment." (Tr. 101.)

The next entry on Ms. Hicks' log is dated May 1, 2015. On that date, Ms. Johnston spent about a half-hour talking to a former employee, Tom Dettman, in the Company's lobby. (Tr. 124-25.) Ms. Johnston had hired Mr. Dettman to do the video of her wedding. He was apparently there to talk about the wedding video, at least that is what he told Collin Cruttenden. (Tr. 128.) Ms. Johnston claimed that Mr. Dettman was there to see Mr. Cruttenden, not her. However, Mr. Cruttenden had no appointment with Mr. Dettman, and they exchanged pleasantries for about one minute. (*Id.*) It was Mr. Cruttenden who noticed the inordinately long time Mr. Dettman spent talking to Ms. Johnston while she was supposed to be working. (Tr. 127.)

Similarly, on July 23, 2015, Ms. Hicks observed that Ms. Johnston spent another 30 minutes or more socializing with her sister-in-law in the reception area. (Tr. 103-04, and 145.)

On July 28, 2015, Ms. Hicks addressed the issues with the two visitors and she also addressed Ms. Johnston's working unapproved overtime. (Tr. 140.)

The final item on Ms. Hicks' log was as follows:

> "Wednesday, August 12 – spent all day on a long MS Word document … ??"

That document was admitted as Respondent's Exhibit 7. It is a 4-page, singled-spaced Word document. It is a letter from Ms. Johnston to Weddington Way, and the topic is her bridesmaids' dresses. There are a number of things about this document that are undisputed: (1) it is personal, (2) Ms. Johnston worked on this document while she was at work and supposed to be working on Company business; and (3) the document was opened on her computer for nearly four hours on August 12, 2015. (Tr. 105-06, 210.)

The only question about what happened on August 12 is whether Ms. Johnston typed the document from scratch on that date or whether she only worked on editing it on that date. According to Ms. Johnston, she did not type it from scratch. Rather, her mother typed it and e-mailed it to her. Ms. Johnston took over from there and did editing while she was supposed to be working. (Tr. 106-07.)

A search of the Company's computer system showed that Ms. Johnston's mother, Laura Ball, routinely sent personal e-mails to Ms. Johnston on Ms. Johnston's Andronaco e-mail account. Respondent's Exhibit 11 is a list of those e-mails. (Tr. 214.) What the search also showed was that there was no e-mail from Ms. Johnston's mother in August 2015 which contained an attachment. (Tr. 216.)

Ms. Johnston left open the possibility that her mother may have used Ms. Johnston's personal e-mail account. Of course, the question that arises is since Ms. Johnston's mother had

so routinely used the Andronaco account why would she have used a personal e-mail account this time?

Ms. Hicks saw that Ms. Johnston was working on this letter at work, and this was the last straw:

> A. I mean I was very upset about it. I mean I'm extremely behind on all of my work. We had just given Lindsey extra time off without penalty for her wedding, and she had just come back, you know, less than a week ago, and she's spending all this time working on this letter, when I knew there was a ton of other work that needed to be done. I was very mad. I didn't say anything at the time because I was busy and I didn't know how to react. So I discussed what I found with Cheryl Sarver in HR.
>
> Q. Okay. Did you come to some conclusion?
>
> A. Yeah. We thought that this is grounds for termination.

(Tr. 149.)

Ms. Hicks and Ms. Sarver planned to terminate Ms. Johnston at the end of the day on Friday, August 14. However, earlier that Friday, Ms. Johnston asked for more time off. (Tr. 154.) She wanted to leave early. (Tr. 151.)

Since she made that request, Ms. Hicks and Ms. Sarver decided to meet with her earlier in the day to tell her she was terminated so that she could leave early. As General Counsel's Exhibit 11 shows, Ms. Hicks had come to understand that Ms. Johnston was trying to pass along information to Mr. Barrett. Thus, when the meeting started, that was the item that Ms. Hicks addressed first. She had intended to get into the other performance issues, but Ms. Johnston became upset and starting crying so Ms. Hicks ended the meeting before addressing the performance issues. (Tr. 153.)

**B. <u>The Alleged Accusation Of Disloyalty</u>**

This allegation is stated at paragraph 8 of the Complaint as follows:

> 8. About August 14, 2015, Respondent, by Kaila Hicks at its Kentwood facility, accused the Charging Party of disloyalty toward Respondent because of her protected concerted activities.

This allegation was never the subject of any unfair labor practice charge. The charge in this case was admitted as General Counsel's Exhibit 1(a). It states in its entirety as follows:

> On or about August 14, 2015, the Employer discharged me because of my association with former employee Nate Barrett, and the Employer's belief that he and other employees engaged in protected concerted activity for mutual aid and protection, and to discourage employees from engaging in those activities.
>
> At all times the Employer has maintained in its Employee handbook overly broad rules restricting employee Sec. 7 rights.

While there was never any charge filed about this allegation, the testimony was allowed over objection.

Ms. Johnston's testimony with regard to the disloyalty comment was that when her employment was terminated, Ms. Hicks said to her "we can't trust your loyalty with the company." (Tr. 87.) General Counsel's Exhibit 11 are the notes Ms. Hicks took describing the content of the termination meeting. Those notes showed that Ms. Hicks told Ms. Johnston had lost the Company's trust and that they "didn't feel that she was loyal to the company." It goes on to say that the reason for the concern about loyalty was "we felt that she was acting as advocate for Nate and attempting to get information out of Rick Vining to pass along to Nate." And, of course, this was shortly after the Company had filed a lawsuit against Mr. Barrett.

## III. ARGUMENT

### A. The Discharge Of Ms. Johnston Was Not Unlawful

The specific allegation of the complaint is that Ms. Johnston was discharged because

> "about the months of May, June, and July 2015, Respondent's employee, the charging party, engaged in concerted activities with other employees for the purposes of mutual aid and protection by

> discussing the wages, hours, and working conditions of Respondent's employees."

[GC-1(c), ¶6.]

There was no evidence presented at the hearing to support the allegation that Ms. Johnston discussed wages, hours and working conditions with anyone in May of 2015, June of 2015, or in July of 2015. Indeed, there was not one piece of evidence presented at the hearing that Ms. Johnston had any such discussions with anyone at any time. This absolute failure of proof on the specific allegation of the Complaint by itself requires that the discharge claim be dismissed.

Apparently recognizing that there was no proof to support this allegation, the ALJ based her decision on a different one. This new theory is that Ms. Johnston was discharged because she associated with Mr. Barrett about the lawsuit. This new theory is defective for several reasons. First, since there was no such allegation in the Complaint, the violation cannot be based upon it. Second, even with the Nathaniel Barrett connection, there was simply no protected concerted activity involved. Finally, what the evidence shows is that Ms. Johnston was discharged because of performance issues that her supervisor, Kaila Hicks, began documenting a year before any issue arose with Mr. Barrett.

**1. No Violation Can Be Predicated On This New Theory**

Both the Administrative Procedures Act and the Board's own rules require that a complaint properly inform the charged party of any asserted violation. 5 USC § 544(b)(iii); 29 CFR § 102.15. The Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing. *George Banta Co v NLRB*, 222 U.S. App DC 288, 686 F2d 10, 17 (DC Cir. 1982). For example, in *United Parcel*

*Service, Inc. v NLRB*, 706 F2d 972 (3rd Cir. 1983), the court described the general legal requirements.

> Even where evidence supporting a remedial order is in the record, courts have refused to grant enforcement of a Board order in the absence of either a supporting allegation of a complaint, or a meaningful opportunity to litigate the underlying issue before the ALJ. See, e.g., *Blake,* 663 F2d at 279; *Montgomery Ward Co. v NLRB*, 385 F2d 760, 763-64 (8th Cir. 1967).

*Id.* at 978.

In this case, of course, there was no allegation in the Complaint that Ms. Johnston was discharged because she maintained a relationship with Mr. Barrett. Thus, there can be no finding of a violation based on that theory.

The ALJ concludes that her decision can be based on this new theory because it "was fully litigated." Of course, it was not, nor could it be. The allegation was that Lindsey Johnston was discharged because she "discussed wages, hours and working conditions of Respondent's employees." Respondent came prepared to defend against that claim by showing (1) she did not discuss wages, hours and working conditions, (2) that Respondent had no knowledge that she did, and (3) that she was in fact discharged for performance issues. In other words, Respondent was prepared to fully litigate the claim that was identified in the Complaint. Respondent was denied the opportunity to prepare for this new claim, to identify and subpoena witnesses who might aid in the defense against the new theory. The ALJ's view is apparently that since evidence was presented about the discharge, any theory about why that discharge might have been unlawful was necessarily fully litigated. Of course, this would be rarely true, if ever. Defenses and evidence are developed to meet the claims that are made, not whatever might occur to someone after the hearing.

### 2. The Board's New Theory Is Fatally Deficient Because There Was Never Any Protected Concerted Activity And Because The Company's Focus With Regard To Mr. Barrett Was Entirely On The Potential That He Had Unauthorized Access To Confidential Data

The ALJ's theory goes something like this: Mr. Barrett engaged in protected concerted activity when he had a conversation with Mr. Cascaden in May of 2015, and since Ms. Johnston was in contact with Mr. Barrett in August 2015 about the lawsuit, her discharge must have somehow been connected to the Cascaden/Barrett conversation. This game of leap frog fails because Mr. Barrett never engaged in any protected concerted activity and because the undisputed evidence is that the Company's entire focus with regard to Mr. Barrett was the concern that he had unauthorized access to its computer system, not because of the substance of his conversation with Mr. Cascaden.

As Mr. Barrett described it, the discussion he had with Mr. Cascaden about wage rates on May 28, 2015, fell into the category of mere gossip, not protected concerted activity. Illustrating this is *Ellison Media Company*, 2004 NLRB LEXIS 605 (2004). In that case, an employee had sent an e-mail to another employee describing an altercation he had with his supervisor. The General Counsel argued that the e-mail constituted protected concerted activity. The ALJ held that the e-mail did not constitute protected concerted activity:

> For communications between employees to be found to be protected concerted activity, they must look toward group action. The e-mail does not meet that standard. See *Mushroom Transportation Co. v. NLRB,* 330 F.2d 683 (3rd Cir. 1964); *Alex R. Thomas & Co.,* 333 NLRB 153 (2001).

(*Id.*)

Mr. Barrett's own testimony shows the conversation he had clearly did not "look toward group action." He and Mr. Cascaden were at most gossiping around the "water cooler."

Mr. Andronaco's testimony, which Mr. Barrett confirmed, was that the thing that caused him worry was that Mr. Barrett or someone else may have had the administrative password and, thus, the ability to access the Company's system which contained all sorts of highly confidential information. Of course, an employer does not violate the law by taking action against employees when it believes they are misusing such confidential information. *Flex Frac Logistics, LLC*, 360 NLRB 120 (2014).

The ALJ dismisses the Board's decision in Flex Frac Logistics as not applicable because it involved the application of an overly broad confidentiality rule. But the principle underlying decision applies directly to the ALJ's new theory. In *Flex Frac*, the discharged employee worked in the accounting department. She shared confidential information about rates with another employee and with outside contractors. She was discharged because of this disclosure. In holding the discharge to be lawful, the Board stated:

> "... Lopez was not discharged for discussing wages or other terms and conditions of employment, nor would her discharge be perceived as such."

*Id.* at p. 2.

Obviously, Ms. Johnston was not discharged because she discussed wages or other terms or conditions of employment. There was no evidence that she did or that anyone in management thought she did. Indeed, if there had been any such evidence, then the ALJ would not have had to reach to this new theory. As the new theory goes, she was discharged because she associated with a person who was on the other side of a lawsuit that involved improper access to the Company's computer system. While Ms. Johnston was in reality discharged due to performance problems, even the ALJ's new theory does not support a finding of a lawful discharge. If, as the ALJ says, she had been discharged because the Company was concerned that she was assisting

Mr. Barrett with the defense of the lawsuit that would not be unlawful, just as the discharge in *Flex Frac* was not.

Another case illustrating the deficiency of the new theory is *Joseph Schlitz Brewing Co.*, 211 NLRB 799 (1974). In that case, the alleged discriminitee was an office clerical employee. She worked at a facility where employees were represented by the Steelworkers union. Her husband was a member of that union, but worked at a different location. The alleged discriminitee and her husband were social friends with the Vice-President of the Steelworkers union. She was discharged admittedly because the Company was concerned that because of these relationships, she might disclose confidential labor relations information. The Administrative Law Judge found the discharge to be a violation, the Board reversed stating:

> In our view, Respondent's discharge of Sharon Pollard was motivated by its legitimate desire to protect the confidentiality of its labor relations matters from disclosure to others. Mrs. Pollard gave Respondent ample reason to question her suitability for her job. Her inquisitive actions included the screening of telephone calls to the industrial relations manager's office and her questioning of that manager's secretary concerning the reason for an employee's meeting in the manager's office and whether the employee was being terminated. These actions, not surprisingly, led Respondent to suspect that she was trying to obtain confidential information improperly for the purpose of transmitting it to others. In these circumstances, we would not find her discharge to be a violation of Section 8(a)(3) of the Act and, accordingly, we would dismiss the complaint.

(*Id.*)

The ALJ's new theory runs straight into the *Schlitz* case. Even if Ms. Johnston's association with Mr. Barrett had been the motivating factor, that would not be unlawful. The Company would be entitled to take such action to protect its position in the lawsuit. The ALJ dismisses the *Schlitz* decision because the job duties of the receptionist in that case were not identical to Ms. Johnston's. But it was not the job duties that made the difference in that case. It

was the receptionist's relationship to people who had an adverse legal position to the employer, which is exactly the case here.

Of course, part and parcel of the ALJ's decision is her conclusion that Mr. Barrett was an "employee" as defined by § 2(3) of the Act. Obviously, if he were not an "employee," then whatever association Ms. Johnston had with him would not be concerted. To support her conclusion that Mr. Barrett was an "employee," the ALJ cites to a number of Board decisions[2] and, thus, takes the position that any member of the "working class" is an employee for all time with respect to any employer for any purpose under the Act. That is too broad of a reading and not even supported by the statute itself. Specifically, § 2(3) identifies the circumstances under which an ex-employee would be an employee for purposes of the Act as one "whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment ...". Interestingly, in each of the cases cited by the ALJ, the employee whose status as an employee was in question, fell squarely into one of the categories specifically identified in § 2(3) of the Act. Of course, Mr. Barrett did not fit into any of these categories. The cessation of his employment with Respondent was not because of an unfair labor practice or labor dispute. He quit his job to take another one.

The material facts in this case are almost identical to those in *NLRB v Texas Nat'l Gas Corp.*, 253 F2d 322 (5th Cir. 1958). In that case, the alleged discriminitee was alleged to have been engaged in protected concerted activity with the former employee. The court held that since the former employee did not meet the definition of an employee stated in § 2(3) of the Act, whatever activity the discriminitee engaged in with that person would not be concerted:

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[2] *Redwood Empire, Inc.*, 296 NLRB 369 (1989); *Little Rock Crate Co.*, 227 NLRB 1406 (1977); and *Thomas Steel Co.*, 281 NLRB 389 (1986).

> The status of Henley on July 9th was not within the commonly accepted meaning of the word 'employee.' We are reminded though that technical concepts of employment are to be rejected in determining whether at a specified time a particular person is an employee within the meaning of the Act. [citations omitted] We do not have here a case where it is claimed that an applicant for employment is an employee, nor is our case one involving a person wrongfully discharged. The statement that 'employee' includes any member of the working class is too broad. No precedent is brought before us which holds that an employee who has been rightfully discharged for cause wholly unrelated to any activity within the protection of the Act continues to be an employee within the intent and meaning of the Act. We conclude that Henley was not an employee at the time of his unsuccessful efforts to get a picket line set up and hence Hood's participation with him in that endeavor was not a 'concerted activity' within Section 7 of the Act, 29 U.S.C.A. § 157.

*Id.* at 325.

So, too, in this case, at the time the lawsuit against Mr. Barrett he was no longer an employee within the meaning of the Act. Whatever association or activity Ms. Johnston engaged in with him was not concerted and, therefore, even if that had been the basis for her discharge, it does not support a finding of an unfair labor practice.

### 3. Ms. Johnston's Discharge Was Not Because Of Her Association With Mr. Barrett

Ms. Johnston was not discharged because of her association with Mr. Barrett. She was discharged because of her performance problems:

- Poor attendance spanning the last year of her employment. She was always in a negative point situation.
- Poor marks on her performance review due to her failure to take on responsibility and to maintain acceptable attendance.
- Routine failure to clock in and out as required.

- Gaming the system by punching in before she even parked her car in order to avoid a tardy mark.
- Spending lengthy periods of time entertaining visitors in the Company's lobby while she was supposed to be working on two occasions.
- Typing (or editing) the long letter about her bridesmaids dresses during work time.

The ALJ points to three items to argue that this lengthy list of performance issues was not the motivation for Ms. Johnston's termination. Those three items are General Counsel's Exhibit 11 (incorrectly identified as GC Ex. 18 in the Decision), the fact that Ms. Johnston was not more harshly disciplined earlier, and what the ALJ characterizes as a failure to conduct a meaningful investigation into the wedding letter.

With regard to General Counsel's Exhibit 11 the undisputed testimony is that that was not a document intended to itemize the reasons for Ms. Johnston's termination, it was a document created to memorialize the discussion that occurred at her termination meeting. (Tr. 162.) Remember, Ms. Hicks testified that at that meeting she had intended to address not only what she had learned about the contact with Mr. Barrett, but also the other performance issues detailed above. However, before she got to those other issues, Ms. Johnston became very emotional and started crying so Ms. Hicks decided to end the meeting. In fact, Ms. Johnston herself confirms that just before the meeting ended Ms. Sarver started to mention performance issues. (Tr. 87.) Thus, GC-11 is not documentation of the reasons for Ms. Johnston's discharge, instead it was only a memorialization of the actual discussion that took place at the meeting, a meeting that was cut short.

While it is true that the Company did not fire Ms. Johnston until it did, the ALJ's conclusion that it tolerated her performance issues is a stretch. In fact, each and every one of her performance issues was addressed. Her attendance issues were specifically addressed with her by the Company's CFO and resulted in poor marks on her performance review. She was given a formal written warning (R-Ex. 2). Ms. Hicks verbally reprimanded her about her attendance and failure to punch in and out, and the two visitors (her videographer and her sister-in-law) in the summer of 2015. Ms. Johnston was aware of each and every item of misconduct, she was aware that the Respondent was not tolerating it, and that it was negatively impacting her employment relationship. These things were not tolerated. They were addressed and ultimately led to discharge.

Last, the ALJ claims that the fact the Company did not forensically examine Ms. Johnston's computer before the day of trial shows a lack of investigation. There was no reasonable point to a forensic investigation at the time of the discharge. Ms. Hicks knew what she saw – Ms. Johnston was working on a personal matter on the Company's computer during work time. There was not any need for a forensic examination. Ms. Hicks saw it. The only reason for the forensic examination on the day of the trial was to refute Ms. Johnston's testimony. And, of course, what the forensic exam did was confirm that Ms. Hicks saw what she said she saw and that Ms. Johnston's testimony was not truthful.

The General Counsel pointed to a raise Ms. Johnston received in May of 2015. It was Mr. Andronaco who gave Ms. Johnston the raise. Ms. Hicks was never in favor of it, and told Mr. Andronaco she opposed it. (Tr. 163.) However, it was Ms. Hicks who made the decision to terminate Ms. Johnston, not Mr. Andronaco. Of course, the raise was given before the more significant performance issues occurred – entertaining the two visitors in the lobby, and spending

the day writing the letter about the bridesmaids' dresses. Indeed, the document that most accurately states the reason for Ms. Johnston's discharge was the handwritten log that Ms. Hicks started keeping beginning in January 2015, Respondent's Exhibit 6.

**B. The Allegation Concerning Accusation of Disloyalty Should Be Dismissed**

First, because there was never any unfair labor practice charge making allegations about an accusation of disloyalty, that allegation should have never been made part of the Complaint and ought to be dismissed on that basis. In *Nickles Bakery of Indiana, Inc.*, 296 NLRB 927 (1989), the Board addressed the question of when an allegation not included in the charge could make its way into a complaint. The Board held that allegations are not properly put in a Complaint unless they are at least "closely related" to the allegation of the charge. To be closely related, they must arise from the same factual circumstances and be subject to the same defenses. (*Id.* at 928.) These allegations of the Complaint in this case are entirely a different type than were contained in the charge, and the substantive defenses are entirely different.

Even as Ms. Hicks' reference to loyalty during the termination meeting does not constitute any violation. It is obviously not an automatic unfair labor practice to question an employee's loyalty. It is only when the accusation of disloyalty is due to some protected activity that a violation occurs. *Ferguson-Williams, Inc.*, 322 NLRB 695, 699 (1996). Here, Ms. Hicks' reference to disloyalty was not in connection with any protected activity of Ms. Johnston. It was made in response to her suspicion that Ms. Johnston was looking to assist Mr. Barrett against the Company with regard to the lawsuit (GC-11).

## IV. CONCLUSION

For the reasons stated herein, Respondent requests that the Board grant its exception to the ALJ's decision.

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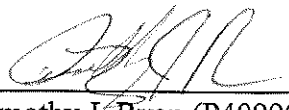
Dated: May 18, 2016

By: 

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